

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
GARY TSIRELMAN, :
:
Plaintiff, : 10-CV-00903
:
v. : 225 Cadman Plaza East
:
RICHARD F. DAINES, M.D., *et al.*, : Brooklyn, New York
:
Defendants. : September 15, 2010
:
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TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES SENIOR JUDGE

APPEARANCES:

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1 (Proceedings began at 10:09 a.m.)

2 THE COURT: Good morning, everybody.

3 MR. CHEN: Good morning, Judge.

4 THE CLERK: Civil cause for motion, Tsirelman v.
5 Daines, et al.

6 Counsel, make your appearances please. For the
7 plaintiff.

8 MR. CHEN: Clifford Chen. My appearance.

9 THE COURT: You're now appearing for the plaintiff?

10 MR. CHEN: Yes, yes. Along with --

11 THE COURT: He's no longer pro se?

12 MR. CHEN: He's not pro se, no.

13 THE COURT: Okay.

14 MS. LEONE: Kathryn Leone from the New York
15 Attorney's General on behalf of defendant. This is our legal
16 intern.

17 MR. ANDRANOPOLIS: Spiro Andranopolis [Ph.].

18 THE COURT: And where are you going to school?

19 MR. ANDRANOPOLIS: Cuny Law School.

20 THE COURT: Cuny?

21 MR. ANDRANOPOLIS: Cuny in Flushing. On the campus
22 of Springs College.

23 THE COURT: Oh, yes, yes. Yes.

24 MR. ANDRANOPOLIS: Yes, sir.

25 THE COURT: Oh, Cuny [inaudible].

1 MR. ANDRANOPOLIS: [Inaudible]

2 THE COURT: All right. I'll hear your motion.

3 MS. LEONE: Thank you. Petitioner is bringing the
4 civil rights -- plaintiff is --

5 THE COURT: Keep your voice up.

6 MS. LEONE: Plaintiff is bringing a civil rights
7 action alleging various due process violations.

8 THE COURT: In front of you there's the
9 [unintelligible] up there. Can you hear?

10 MS. LEONE: He's alleging various due process
11 violations that he says occurred in his position disciplinary
12 proceeding. There his license to practice medicine was
13 revoked.

14 THE COURT: Excuse me. Have you filed a notice of
15 appearance?

16 MR. CHEN: Yes.

17 THE COURT: I didn't have it. When was that filed?

18 MR. CHEN: It was yesterday. Early afternoon.

19 THE COURT: Okay.

20 MS. LEONE: His license to practice medicine was
21 revoked after a finding of fraud. He was found to have billed
22 insurance companies for services he did not provide. He was
23 also fined \$100,000.00. He's now alleging due process
24 violations specifically that the standard of proof in those
25 proceedings must be higher than preponderance, that there

1 was -- that he -- that there's a lack of evidentiary rules,
2 and that there's a lack of a nondiscretionary mechanism to
3 open -- or to reopen a hearing and there's been a change in
4 the law. And so I'm just going to highlight some of our
5 points for each violation -- alleged violation beginning with
6 standard of proof.

7 He brings a facial challenge. The Legislature has
8 spoken here it is a preponderance of the evidence standard
9 that has been upheld in New York state courts and is actually
10 the predominant standard throughout the country in medical
11 disciplinary tribunals.

12 There's also Second Circuit law where upholding a
13 preponderance standard in attorney disciplinary actions, which
14 is the closest thing I could find to our case here, and
15 specifically plaintiff is challenging the standard of proof as
16 it relates to the fraud charge. He says it should be higher
17 specifically for fraud but there's really nothing about fraud
18 that compels a higher standard. We've seen the Supreme Court
19 when it has to assign a standard to a fraud statute, say,
20 securities fraud or civil RICO that they have assigned
21 preponderance of the evidence. And even though there is this
22 intent --

23 THE COURT: In court of what, the United States?

24 MS. LEONE: That's correct. And even though there's
25 an intent element of fraud that too does not necessarily

1 compel a higher standard. In fact, we've seen when the
2 Supreme Court upheld the preponderance standard and then in
3 dealing with the ex-patriation statute that specifically
4 requires an intentional ex-patriation act and the reasoning
5 there was intensive heavy burden to begin with so we shouldn't
6 also elevate the standard of proof as well and that was
7 echoed --

8 THE COURT: I'm not sure I'm following what you're
9 saying.

10 MS. LEONE: Well, plaintiff's argument was that --

11 THE COURT: Well, I understand plaintiff's argument
12 but in what cases has the Supreme Court of the United States
13 upheld the standard of preponderance in connection with
14 disbarment or with respect to medical revocation?

15 MS. LEONE: I haven't found one, no.

16 THE COURT: Let --

17 MS. LEONE: I was just relating it to --

18 THE COURT: Have you cited the Supreme Court cases?

19 MS. LEONE: Yes. In dealing with ex-patriation
20 statute, yes. That's the Vance case.

21 THE COURT: And that's a serious problem, you say,
22 for the person, ex-patriated.

23 MS. LEONE: Yeah. Right. Well, they said it's --
24 the preponderance standard was sufficient because it's a
25 heavy -- the intentional -- proving intentional act is heavy

1 to begin with, a heavy burden, so they didn't feel the need to
2 then increase the standard of proof.

3 THE COURT: Well, preponderance standard is more
4 probable than not.

5 MS. LEONE: The preponderance standard is -- yes, I
6 think so, yes. So even looking at the Matthews v. Eldridge
7 analysis --

8 THE COURT: Do you have any other Supreme Court or
9 federal cases --

10 MS. LEONE: I --

11 THE COURT: -- applying the preponderance standard
12 to serious matters?

13 MS. LEONE: I have the Herman and the Kleen v.
14 Huddleston case where the Supreme Court noted -- this was on
15 dealing with the securities -- securities fraud statute --
16 where the Supreme Court noted that a higher standard of proof
17 wasn't necessary even though you had to show a person's state
18 of mind. Again, this intent element.

19 THE COURT: What was the intent in?

20 MS. LEONE: I believe it's the securities fraud.
21 intent.

22 THE COURT: Fraud.

23 MS. LEONE: Yeah. Fraud. It was securities fraud,
24 right. And it was in a footnote at the very end of the case
25 where they note that.

1 THE COURT: And you cited that in your brief?

2 THE COURT: I did cite that. I did cite --

3 MS. LEONE: Yes.

4 THE COURT: Do you have any Second Circuit cases
5 like that?

6 MS. LEONE: I mean, the closest I found to this case
7 was the attorney disciplinary cases or just one --

8 THE COURT: Second -- no. The Court of Appeals for
9 the Second Circuit.

10 MS. LEONE: That's correct.

11 THE COURT: You found one attorney discipline case.

12 MS. LEONE: That's correct. And the Eastern
13 District as well, the scope on that as well.

14 THE COURT: Have you cited the Eastern District?

15 MS. LEONE: I did.

16 THE COURT: Yes.

17 MS. LEONE: Yes. So we went through a Matthews v.
18 Eldridge analysis as well and when you look at the substantial
19 interest of the State in protecting the public versus the
20 interests here, the medical license, which is at most property
21 interest, coupled with the already very low risk of error in
22 attorney -- in the physician disciplinary proceedings based on
23 the -- all of the procedures afforded in the Public Health Law
24 to the physician --

25 THE COURT: I didn't follow that sentence.

1 MS. LEONE: Sorry. So there's a -- the physician
2 disciplinary proceedings already have a very low risk of
3 error. The Public Health Law provides many protections to the
4 physician both --

5 THE COURT: Like what?

6 MS. LEONE: -- during and after. They are entitled
7 to an attorney. They're entitled to --

8 THE COURT: He was entitled to one attorney at the
9 hearing?

10 MS. LEONE: Yes. He was entitled. He had an
11 attorney. Specifically in this case he had an attorney.

12 THE COURT: At the hearing.

13 MS. LEONE: At the hearing. He produced witnesses,
14 evidence, he cross-examined witnesses for --

15 THE COURT: And that's in the statute or --

16 MS. LEONE: That's all in the statute.

17 THE COURT: -- [unintelligible]?

18 MS. LEONE: Public Health Law 230. And so even
19 under Matthew v. Eldridge analysis it's still -- it comes out
20 as a preponderance standard that is -- that is adequate in
21 this case.

22 Petitioner also brings an as-applied standard. As
23 applied --

24 THE COURT: Are there any evidentiary rulings
25 embodied in the statute? What rule -- what evidence?

1 MS. LEONE: Public Health Law 230.10(f) says that
2 there are no rules -- that the hearing doesn't have to follow
3 set the Rules of Evidence, but that they have to show -- prove
4 their case by a preponderance of the evidence so there are no
5 set rules but, you know, the -- in order to comport with due
6 process the evidence has to be reliable and --

7 THE COURT: Do you have any federal cases on that
8 issue?

9 MS. LEONE: I do have a Southern District case
10 called Balgwena [Ph.] that says that there -- you don't have
11 to comport with due process. I mean, you don't have to have
12 strict Rules of Evidence to comport with due process.

13 THE COURT: In what kind of case?

14 MS. LEONE: Balgwena was a -- that was a hearing
15 regarding taking children out of a foster care system.

16 THE COURT: Oh.

17 MS. LEONE: Foster care home.

18 THE COURT: Well, that was a serious matter.

19 MS. LEONE: Right. And -- yes, so they -- and that
20 was a -- I believe that was substantial --

21 THE COURT: Do you have any --

22 MS. LEONE: -- evidence.

23 THE COURT: Do you have any cases involving any of
24 the federal statutes with respect to benefits?

25 MS. LEONE: There is a --

1 THE COURT: Yes.

2 MS. LEONE: There's the Richardson v. Peralis case,
3 I believe, that's dealing with Social Security benefits.

4 THE COURT: And what standard?

5 MS. LEONE: Well, the -- they also said that you
6 just have to have reliable evidence in an administrative
7 hearing. Reliable and probative.

8 THE COURT: Social Security benefits?

9 MS. LEONE: Yes, I believe so.

10 THE COURT: And did the federal Rules of Evidence
11 apply to the administrative hearing in the Social Security
12 cases?

13 MS. LEONE: That I don't know. I don't know.

14 THE COURT: Well, we have reviews in connection with
15 the federal statute controlling retirement benefits and things
16 like that where the employer sets up a program for employees.
17 What evidence standards do they use there?

18 MS. LEONE: I'm not familiar with the evidence
19 standard. I'm sorry.

20 THE COURT: I see. Okay. You have nothing on that.

21 MS. LEONE: Basically what I have are the cases that
22 say reliable evidence is enough in administrative hearings.
23 That's the two cases that I cited for that.

24 THE COURT: But there's no case that you found that
25 says that you have to follow the same script evidentiary

1 standards as a reply in federal or state courts.

2 MS. LEONE: That's correct. I did not find any case
3 like that.

4 THE COURT: Okay.

5 MS. LEONE: Petitioner --

6 THE COURT: I assume there is no such case unless
7 the plaintiff can show me a case. But you've looked for those
8 cases.

9 MS. LEONE: I looked for those and what I found was
10 the Southern District case that said it's not a due process
11 violation simply because there aren't Rules of Evidence on --

12 THE COURT: Okay.

13 MS. LEONE: -- it. Petitioner is also challenging
14 the burden of proof as applied to his case, as applied to his
15 disciplinary matter. Petitioner brought an Article 78
16 proceeding following the physician disciplinary proceeding.
17 And he could have brought his challenge to the burden of proof
18 there as applied to his case. It was the same parties. It
19 was the same subject matter and he could have gotten the same
20 relief there that he's seeking here, so it really shouldn't be
21 re-litigated again here, so it's barred by -- our argument is
22 that it's barred by *res judicata*.

23 THE COURT: Does the Court in Article 78 proceeding
24 have the right to say that the statute applied in the
25 proceeding being challenged was unconstitutional?

1 MS. LEONE: I believe so. In Article 78 I don't
2 believe he could facially attack it -- or I mean, he could but
3 he doesn't have to whereas he is taking --

4 THE COURT: You haven't answered my question. Does
5 the Court -- the state court in an Article 78 proceeding have
6 the power to declare an act relied upon which is being
7 challenged unconstitutional?

8 MS. LEONE: Yes. In an Article 78 you can make
9 Constitutional arguments --

10 THE COURT: You have a case that says that?

11 MS. LEONE: I do. It's in my brief. I'm not -- I
12 don't have it on the --

13 THE COURT: Okay.

14 MS. LEONE: -- tip of my tongue, but it is in my
15 brief where constitutional challenges can be made in Article
16 78 --

17 THE COURT: Okay.

18 MS. LEONE: -- proceedings, yes.

19 THE COURT: Well, is it your argument that by
20 approving the administrative hearing in effect the Court was
21 claiming that the statute was constitutional? Because if they
22 had decided it was unconstitutional it would have -- they
23 would have had to grant the petition.

24 MS. LEONE: Well, he didn't make this argument.

25 THE COURT: Whether he made it or not. If something

1 was unconstitutional wouldn't the Court have the power and
2 wouldn't impliedly the issue be before the Court?

3 MS. LEONE: The Court certainly could have made that
4 determination, yes.

5 THE COURT: Well, isn't it normally before the
6 Court? In an Article 78 proceeding, what is this?
7 Essentially mandamus?

8 MS. LEONE: Yes. Mandamus and -- yeah. That's
9 correct.

10 THE COURT: Somebody is doing something that's
11 unconstitutional wouldn't you be entitled to mandamus under
12 traditional common law?

13 MS. LEONE: He certainly could have brought those
14 constitutional --

15 THE COURT: Wouldn't that necessarily be an issue
16 for the Court? If somebody came before you with somebody --
17 with something that was unconstitutional wouldn't they be
18 entitled to mandamus and Article 78 relief?

19 MS. LEONE: Yes.

20 THE COURT: Well, can't we assume that the Appellate
21 Division knew what the Constitution required?

22 MS. LEONE: Yes.

23 THE COURT: Have you got cases where the Appellate
24 Division in an Article 78 proceeding declared that the
25 petition had to be granted because something unconstitutional

1 was being done in the way of interpreting or applying a
2 statute?

3 MS. LEONE: I didn't -- I did not cite any case to
4 that, I don't believe, where the Appellate Division found
5 constitutional -- a constitutional deprivation. I can
6 research it.

7 THE COURT: Well, give me a letter on that.

8 MS. LEONE: Okay.

9 THE COURT: But in any event, your contention is he
10 could have made the argument.

11 MS. LEONE: Sure, yes.

12 THE COURT: Do you have cases on that that you can
13 argue that it is an unconstitutional statute?

14 MS. LEONE: Well, he can argue that certainly that
15 it was unconstitutional as applied to his case so that there
16 were due process violations that occurred during that hearing.

17 THE COURT: Or facially.

18 MS. LEONE: Article 78, no, he can't -- he -- I
19 guess maybe he could. He just doesn't have to bring an
20 Article 78. I can't argue *res judicata* for that -- for a
21 facial challenge.

22 THE COURT: Well, you haven't answered my question.
23 Do they have the power to declare the petition has to be
24 granted because the statute relied upon in the administrative
25 hearing was unconstitutional on its face?

1 MS. LEONE: I think they have the power to do that.

2 THE COURT: Do you have a case?

3 MS. LEONE: No, I did not cite a case for that.

4 THE COURT: Well, would you look for a case and give
5 me the letter?

6 MS. LEONE: Yes, I will. Yes, I will.

7 THE COURT: Now, what is the state law with
8 respect -- are you claiming *res judicata* or collateral
9 estoppel?

10 MS. LEONE: *Res judicata* for the as-applied
11 challenges.

12 THE COURT: If they had the power to declare it
13 unconstitutional and if by failing to do so -- I'm just asking
14 because I'm not saying this is the argument -- they impliedly
15 found that it was a constitutional statute requirement on its
16 face. And if a party doesn't raise that issue what is the New
17 York state law with respect to *res judicata* or the federal --
18 the federal law, as I understand it, is that you have to bring
19 up all these points or otherwise you've waived it, right?

20 MS. LEONE: That's what I've found, too, for *res*
21 *judicata* in New York that they -- New York follows this
22 transactional approach so you have to look at the subject
23 matter that's before the Appellate Division and --

24 THE COURT: Under New York *res judicata* if he could
25 have argued unconstitutionality but did not in any respect as

1 he waived that argument in a subsequent action.

2 MS. LEONE: Yes. My argument is that, yes, that
3 it's barred.

4 THE COURT: And you have cases that say that is the
5 interpretation of *res judicata* in New York?

6 MS. LEONE: I'm not sure what cases I've cited for
7 that.

8 THE COURT: Well, I'd like you to give me a
9 letter --

10 MS. LEONE: Okay.

11 THE COURT: -- supplementing your brief. I think
12 it's New York law *res judicata* that applies. Is that right?

13 MS. LEONE: That's correct. Yes.

14 THE COURT: I think the *res judicata* on the federal
15 law would incorporate arguments that you might have made but
16 did not make. Is that right?

17 MS. LEONE: Exactly. Exactly, yes.

18 THE COURT: Is that the restatement of judgment?
19 Have you dealt with this problem?

20 MS. LEONE: Yes. I mean, I've cited numerous cases
21 for this argument.

22 THE COURT: But if you don't raise the argument
23 it's -- you can't raise it in the subsequent proceeding?

24 MS. LEONE: Correct, correct. I have the --

25 THE COURT: And that includes unconstitutionality on

1 its face?

2 MS. LEONE: That I don't know. I don't know.

3 THE COURT: Well --

4 MS. LEONE: Okay.

5 THE COURT: -- would you supplement your brief?

6 MS. LEONE: Sure.

7 THE COURT: Your brief is very good but I'm concerned
8 about this issue.

9 MS. LEONE: Okay.

10 THE COURT: Get me the red book, please, the CPLRs.
11 It's on the bench or in a drawer there.

12 An Article 78 proceeding is an action under the
13 CPLR, is it not?

14 MS. LEONE: It is. It's Section 78.

15 THE COURT: And the Appellate Decision is a division
16 of the Supreme Court and acting here as a *nisi prius* court has
17 the power of the Supreme Court acting as a trial court,
18 correct?

19 MS. LEONE: Exactly. And it's by statute that it
20 goes straight to the Appellate Division as opposed to --

21 THE COURT: But it's -- when you go to the Appellate
22 Division it's the equivalent of going to the *nisi prius* court
23 in a proceeding. Section 103 of the New York CPLR, (a)
24 there's only one form of civil action; (b) "All seated
25 judicial proceedings shall be prosecuted in the form of an

1 action except where otherwise prescribed by law procedure in
2 special proceedings shall be the same as in an action."
3 Doesn't the Appellate Division approach these cases by asking
4 what any trial court would have -- or have jurisdiction are
5 the parties properly before me is there a cause of action and
6 has the defendant attempted to apply an unconstitutional
7 statute or has it attempted to apply a constitutional statute
8 in an unconstitutional way. Isn't that what it has to do
9 under 103?

10 MS. LEONE: Yes, I believe so.

11 THE COURT: I'm just trying to -- I mean, you know
12 more about the practice. I'm just the federal judge. But
13 it's -- and I've already diverted I guess to 7803 -- 7803,
14 which is the Article 78 provision.

15 "Questions which may be raised in such proceeding
16 include (2) whether the body or officer proceeded or is
17 proceeding or is about to proceed without or in excess of
18 jurisdiction; (3) whether a determination was made in
19 violation of the lawful procedure."

20 It uses the word "lawful procedure." Doesn't that
21 include constitutionality?

22 MS. LEONE: Yes.

23 THE COURT: The federal practice has some situations
24 in which you have to go to the intermediate court as well.
25 Immigration cases. How does it deal with immigration cases?

1 The Court of Appeals for the Second Circuit what is its power
2 [ph.]? It's essentially the same kind of review, isn't it?
3 Would you look at those cases and see what it's about and
4 analogize it and [unintelligible] brief. It's an interesting
5 problem.

6 MS. LEONE: Um-hum.

7 THE COURT: As I say, I don't know much about the
8 State practice in an Article 78. I guess historically a
9 combination of the old rich in one simplified practice.

10 MS. LEONE: So the final due process violation
11 allegation is this lack of a non-discretionary mechanism in
12 the Public Health Law that would allow a hearing to be
13 reopened when there's been a change in the law. That's the
14 third claim.

15 THE COURT: And the change in the law here was?

16 MS. LEONE: The change in the law was in November
17 2008 Public Health Law --

18 THE COURT: After the hearing or before?

19 MS. LEONE: After. It was amended -- the law was
20 amended to mandate that OPMC turn over exculpatory evidence
21 when in the past it was not mandatory.

22 THE COURT: What did this new amendment say? Say it
23 again slowly.

24 MS. LEONE: That OPMC -- I don't have the exact
25 words but that OPMC had to turn over exculpatory evidence to

1 the physician.

2 THE COURT: And what is the exculpatory evidence
3 that it's alleged they failed to turn over?

4 MS. LEONE: I believe what they say there is is
5 evidence of other attorney -- other physicians billing the
6 same way that he billed.

7 THE COURT: Well, what is the rule of law with
8 respect to the application of changes in the law subsequent to
9 the ruling in New York?

10 MS. LEONE: In New York. I don't believe that there
11 are retroactive if that's what you're asking.

12 THE COURT: Was the Article 78 proceeding brought
13 before the amendment?

14 MS. LEONE: The Article 78 proceeding was brought,
15 yes, before the amendment and the decision in the Article --

16 THE COURT: Well, generally the rule, as I
17 understand it, in the federal court is if the law is changed
18 during the appeal they apply the new law and remand it. What
19 is the situation in the state court?

20 MS. LEONE: I believe -- you know, I'm not sure.
21 I'm not sure at all.

22 THE COURT: Are you arguing that the new law doesn't
23 apply here?

24 MS. LEONE: Well, I'm arguing that --

25 THE COURT: You are, yes. But you're arguing that

1 even if it does apply, what?

2 MS. LEONE: Even if it applies it wouldn't change
3 the fairness of the hearing.

4 THE COURT: Why not?

5 MS. LEONE: Because there was a -- the basis for the
6 fraud finding was based on his own admission of the
7 misconduct. The bills that were not disputed as unreliable
8 and the credibility determination about his excuses for the
9 billing were just not credible. So any exculpatory evidence
10 and other physicians reviewing it will -- first of all, that
11 doesn't mean that it's not misconduct but --

12 THE COURT: Did you in your brief consider the
13 general rule in the federal courts -- I believe it's also true
14 in the state -- that it's no defense that others were not
15 prosecuted?

16 MS. LEONE: I didn't consider that.

17 THE COURT: In your briefing? That is to say the
18 prosecutor has the discretion to ignore others and prosecute
19 selectively. Second Circuit has ruled repeatedly on that.

20 MS. LEONE: There is --

21 THE COURT: What is the law of New York as well as
22 [unintelligible].

23 MS. LEONE: Can I just say one other thing?

24 THE COURT: Yes.

25 MS. LEONE: The Public Health Law does have a

1 provision that's ten -- that's 230.10(q) that allows a
2 physician to petition to have his or her hearing reopened and
3 that petition goes to the director of OMPC.

4 THE COURT: Is there a time line?

5 MS. LEONE: No.

6 THE COURT: Was there such a petition?

7 MS. LEONE: No.

8 THE COURT: He did not exhaust that remedy?

9 MS. LEONE: No, he did not and he was informed of it
10 and he did not exhaust it.

11 THE COURT: How was he informed?

12 MS. LEONE: By email. In fact, the email is
13 attached to, I believe, they're in my affidavit or the other
14 affidavit submitted.

15 THE COURT: And your contention is he hasn't
16 exhausted his administrative remedy?

17 MS. LEONE: That's my argument that he could have
18 gone this route and he didn't. And had the petition been
19 denied he then could have brought an Article 78 on that.

20 THE COURT: Anything else?

21 MS. LEONE: That's it. Thank you.

22 MR. CHEN: I guess I'll respond to the points in
23 turn, but --

24 THE COURT: Well, I have some question I want to ask
25 you --

1 MR. CHEN: Okay.

2 THE COURT: -- on the facts before you get into the
3 law. You concede that the plaintiff billed under the wrong
4 code.

5 MR. CHEN: I don't think he billed -- as I
6 understand it I don't believe he -- well, the bills. There's
7 a question -- I mean, there was a question of fact whether he
8 was actually involved with the billing at all having
9 outsourced that, but --

10 THE COURT: Did he -- did bills going out -- bills
11 go out under his name --

12 MR. CHEN: Sure.

13 THE COURT: -- for which he was to be compensated
14 under the wrong classification.

15 MR. CHEN: I don't think that the codes themselves
16 were necessarily wrong at the time that they're prepared.
17 They're -- the procedure he performed, the synaptic therapy --

18 THE COURT: What was the procedure he performed?

19 MR. CHEN: As I understand it's a non-evasive pain
20 management procedure that basically applies an electrical
21 current to specific nerve areas.

22 THE COURT: And what is the procedure he billed
23 under?

24 MR. CHEN: Well, he -- the intent was just to bill
25 for that procedure described with for --

1 THE COURT: What is the description of the procedure
2 that he billed under?

3 MR. CHEN: Well, the labels for the codes are one
4 code -- well, what are combined at two codes. One code used
5 various terms that described, as I understand it, part of the
6 theory involving locating the electrodes in the proper place
7 and prepping the machine. As I understand, the second code
8 was meant to describe the actual performance of the therapy
9 monitoring machine and such.

10 THE COURT: Well, that's the one he billed under,
11 the second code, isn't it?

12 MR. CHEN: Well, he billed -- he billed under both
13 codes because I believe that the understanding at the time was
14 that those two codes -- because there wasn't any --

15 THE COURT: Forget about the understanding. Under
16 what code was he billing?

17 MR. CHEN: Well, there wasn't -- the problem is
18 there was a single code that described exactly this therapy.

19 THE COURT: Is there a code that determines how much
20 will be paid for a procedure?

21 MR. CHEN: Well, the -- each code, as I understand,
22 is -- describes some -- can describe a range of procedures for
23 which there is a set payment that insurers come into agreement
24 with.

25 THE COURT: Is there a code number for a procedure

1 that determines what the compensation is for the work done?

2 MR. CHEN: For this particular procedure there
3 wasn't a single code is my understanding.

4 THE COURT: What is the code that he billed under?

5 MR. CHEN: Oh, he billed under two codes, I believe,
6 and that's where the misunderstanding the problem arose from.
7 One code was 64550, which as I under --

8 THE COURT: In fact, read -- read the --

9 MR. CHEN: It reads, "Application of surface neuro
10 stimulator transcutaneous."

11 THE COURT: Okay.

12 MR. CHEN: And this -- and to describe the therapy
13 he performed this -- in full because that didn't -- because
14 that didn't describe the full procedure. He also billed just
15 depending on the location of the electrode either 64613 or
16 64622.

17 THE COURT: What do they read?

18 MR. CHEN: And those are described in the text and
19 this is from a standard -- these are from -- these come from
20 standard text. Each code is linked to a standard description
21 in these books is my understanding of this industry. But the
22 label for 64613 is destruction by neurolytic agent -- I may
23 not be pronouncing these right -- but "Chemo denervation of
24 muscle end plate and cervical spinal muscle" and that was for
25 one location and a different -- and if it was in a different

1 place it would have been described as "distraction by a
2 neurolytic agent, para-vertebral facet joint nerve lumbar
3 single level."

4 THE COURT: Give the code, please.

5 MR. CHEN: Sure.

6 THE COURT: Did he bill under -- this is -- I'm
7 looking at --

8 MR. CHEN: I believe this is -- this was redacted
9 evidence that was presented at the hearing of the bills that
10 were submitted -- or the bills that were placed in dispute.

11 THE COURT: I'm looking at a page marked Court
12 Exhibit 1. It has 2005 at the top, I guess. That's --

13 MR. CHEN: Oh, the doc number and page there is
14 referred to here. It might be useful.

15 THE COURT: Document 17-1.

16 MR. CHEN: Page 2.

17 THE COURT: Page 2. All right. Court Exhibit 1
18 it's called [ph.].

19 [Pause in the proceedings.]

20 THE COURT: Well, what was he billing under, all of
21 these codes?

22 MR. CHEN: Well, these -- as I understand it these
23 describe -- these describe treatments over a number of
24 sessions and so in this case --

25 THE COURT: This is for a particular patient?

1 MR. CHEN: For a particular patient, yes.

2 THE COURT: And he was giving all of these
3 treatments?

4 MR. CHEN: Well, I think it's worth noting that
5 this -- these medical records in the back were also attached
6 to this bill --

7 THE COURT: All right. They're all --

8 MR. CHEN: -- to try to clarify what was going on.

9 THE COURT: On the second part of it at pages 3 of 5
10 and 4 of 5.

11 MR. CHEN: Right. And what it shows, as I
12 understand, is on these various dates he performed synaptic
13 therapy once in the -- on the -- in the shoulder or upper
14 region, once in the lower back region. And so for each upper
15 back region or shoulder region there is a code for the 64550
16 to describe the prep.

17 THE COURT: Well, he did -- he charged 7329 twice.

18 MR. CHEN: No. Well, yes. But once for each
19 application. Each application --

20 THE COURT: One --

21 MR. CHEN: -- one in the shoulder area and one in
22 the lumbar region area.

23 THE COURT: Well, what else did he charge for?

24 MR. CHEN: So each of these codes correspond with a
25 second billing code specific to the region that describes

1 the -- or at least again as I understand it described another
2 part of the procedure monitoring the patient, making sure that
3 the electric currents were being applied properly and such.

4 THE COURT: Well, this says \$335.00, the third item.

5 MR. CHEN: Right.

6 THE COURT: It's all on the same day -- this -- on
7 the same day.

8 MR. CHEN: Right. And so what this describes is
9 that on this --

10 THE COURT: On the same treatment -- oh, excuse me.
11 3/29/2001. That's one patient, correct?

12 MR. CHEN: Yes.

13 THE COURT: He charged 7329, 7329, 35501 and 28172.
14 Correct?

15 MR. CHEN: Yes. So the total charge for one of the
16 synaptic therapy applications on, say, the upper back would
17 have been the combination of the 64550 plus depending on the
18 region either of these other two billing codes.

19 THE COURT: Well, he charged for both of them,
20 six -- he charged for 64550 twice.

21 MR. CHEN: Um-hum.

22 THE COURT: 64613 once and 64622 once.

23 MR. CHEN: Right.

24 THE COURT: Then on 3/30/2001, the next day, he
25 charged again two times 7329, one time 355.01, one time 28172,

1 and then --

2 MR. CHEN: Right. That's a third date.

3 THE COURT: Third date which is next month. It's
4 7325, 7329 -- 7329, 7329, and 35501. And 28172 for a total
5 charge of \$2,349.33, correct?

6 MR. CHEN: Yes.

7 THE COURT: How many times did he put these -- what
8 did he do, put electrodes on a person?

9 MR. CHEN: Well, I believe -- again, this is my
10 understanding of the procedure is that, yeah, there's a
11 machine that issues a wave form of electric pulses. He has to
12 locate -- each time when he performs a procedure he has to
13 prep the electrodes, find the correct location for the nerves
14 on the patient when they come in, and then after they're
15 prepped and placed then be present while the machine is
16 running or be available while the machine is running to
17 monitor that it's going properly and then documenting the
18 procedure and doing follow-up work.

19 THE COURT: Let's get the facts. What -- why was
20 this improper?

21 MS. LEONE: Because he was billing for these nerve
22 destruction procedures, MVPs that he performed -- admittedly
23 never performed.

24 THE COURT: Which one? Which ones?

25 MS. LEONE: I --

1 THE COURT: \$355.01?

2 MS. LEONE: They are called --

3 THE COURT: Destruction by neuro --

4 MS. LEONE: Exactly.

5 THE COURT: -- neurolytic agent?

6 MS. LEONE: Yes.

7 THE COURT: For which he was charging 355 already.
8 He did not perform those?

9 MS. LEONE: He admittedly did not perform the
10 destruction procedures. What he claims to have performed I
11 believe were the synaptic procedures which is billed as the
12 application of surface nerve stimulator.

13 THE COURT: Now, are you contesting that? Did he
14 give this service on 3/30/01 -- 2001 destruction by neurolytic
15 agent?

16 MR. CHEN: Yes.

17 THE COURT: \$355.01.

18 MR. CHEN: Right. Well, yes. The admission --

19 THE COURT: Did he give this service?

20 MR. CHEN: He gave a service that is described by
21 that billing code, yes. And where the confusion arise -- and
22 the argument that I think plaintiff had tried to make during a
23 hearing was that -- was that what the hearing committee
24 interpreted this billing code as being -- as described
25 exclusively is this sort of invasive permanent destruction of

1 nerves which the plaintiff has admitted all along was never
2 performed because that would be improper under the
3 circumstances.

4 But the argument that was made and the reality of
5 the situation was that because there wasn't a single billing
6 code to describe what he was performing, the billing company
7 that -- the coders that specialize in this work picked two
8 codes that even though they weren't -- even -- neither of the
9 two was an exact fit for exactly what happened. The two were
10 the best codes that they could find that described what was
11 actually performed.

12 And, again, to avoid confusion I think it's
13 important to note that these medical records were attached to
14 the bills just to try to clarify exactly what happened so if
15 there's going to be confusion that these permanent invasive
16 procedures were performed that -- and again, as everyone
17 agrees there's never any doubt that the plaintiff ever
18 performed these destructive permanent procedures.

19 THE COURT: He did not.

20 MR. CHEN: He did not.

21 THE COURT: But he charged for them.

22 MR. CHEN: No. He did not. He -- this bill -- the
23 argument is that the -- see, these billing codes can
24 describe -- at least as understood at the time and apparently
25 by the billing company these billing codes can describe a

1 range of different types of procedures. And I believe -- and
2 my understanding is that the billing company even though the
3 textual description here wasn't an exact match for what was
4 done, it was given the range of codes that were available the
5 best code for describing the procedure performed that they had
6 available to them.

7 THE COURT: But it was -- he did not prescribe -- do
8 this procedure described as Court Exhibit Number 1
9 "Destruction by neurolytic agent ran [ph.], camo-denervation
10 of muscle end plate, cervical spinal muscle, e.g., for
11 spasmodic torticollis."

12 MR. CHEN: He didn't perform a permanent invasive
13 version of that procedure and he didn't use chemicals. That's
14 true. But --

15 THE COURT: Well, then he didn't do it.

16 MR. CHEN: Well, it's not -- well, I'd note that the
17 description isn't -- doesn't indicate that it's a permanent
18 procedure and looking at some of the other medical texts or
19 some of the other coding discussions at the time, I think goes
20 when viewed by some -- when you say "destruction" it was
21 destruction of the nerve function on a temporary basis and
22 that the code could encompass that as well.

23 THE COURT: All right. Go on with your argument.

24 MR. CHEN: Just -- right. So, I mean, just to close
25 on this topic, you know, the code here it regards a permanent

1 procedure; doesn't describe what was actually performed. But
2 I think the broader point is that there was no code that he
3 could have picked that did describe what he performed.

4 THE COURT: I understand your position, but he did
5 not do what is described here quite specifically.

6 MR. CHEN: But he --

7 THE COURT: He did something near it.

8 MR. CHEN: Right, but I think it's also common --
9 it's common practice for the billing community to describe a
10 procedure that did not have a specific code assigned to it
11 with these best fit codes.

12 THE COURT: Well --

13 MR. CHEN: And --

14 THE COURT: -- that's another problem. That's a
15 question of whether the community should have been prosecuted.
16 That's a select prosecution issue.

17 MR. CHEN: I'm not sure it's selective prosecution
18 issue if it was the common understanding among people that
19 performed that --

20 THE COURT: Did he notice it was a common
21 understanding?

22 MR. CHEN: I don't -- I don't know personally.

23 THE COURT: Well, he must have if he did --

24 MR. CHEN: I don't know that.

25 THE COURT: -- it and --

1 MR. CHEN: Well, I'm not --

2 THE COURT: -- justifying it. Why did he do it if
3 he knew that it was not a description unless he was also under
4 the impression that this was the appropriate way other people
5 were doing it?

6 MR. CHEN: Well, again, you know, we're going
7 against the facts that were found, I understand, but he wasn't
8 involved in picking these codes in the first place. This
9 was --

10 THE COURT: But he's responsible.

11 MR. CHEN: He's responsible but I think being
12 responsible for codes in terms of what's billed is different
13 than having the intent to defraud someone based on what the
14 choice is made by an outsource billing firm. And, you know, I
15 think --

16 THE COURT: It can be billed differently. Did he
17 sign them?

18 MR. CHEN: Again, it seems that a lot of these were
19 done with the signature stamp on those that the management
20 company had.

21 THE COURT: Well, this Court Exhibit 1 looks like a
22 signature.

23 MR. CHEN: It does and based on the testimony that I
24 looked at from the hearing, my understanding is that the
25 billing company used a signature stamp basically to process

1 these bills without his direct involvement.

2 THE COURT: Well, if he gave them a signature stamp
3 then he was, in effect, authorizing them to sign his name.

4 MR. CHEN: Sure. And that may have been a mistake
5 but, again, I mean, I think what we're dealing with is whether
6 or not he had the fraudulent intent to submit these bills
7 when all he was doing, as I understand it, was telling the
8 billing company what he was performing, providing the medical
9 records which were attached to these bills describing exactly
10 what happened and leaving it to the coders which is a fairly
11 specialized task that doctors, as I understand, don't
12 typically get their hand -- get involved with because it's
13 complicated and involves a lot of interaction with the
14 insurers exactly how to translate medical records that he
15 produced and gave to the billing company and to codes that
16 were understandable and to process by the insurers.

17 Now, you know, obviously these are all factual
18 findings from the hearing committee that aren't, you know, so
19 much directly at issue for a lot of legal arguments we're
20 making here, but I think they do underscore the fact that had
21 there been a standard of proof equal -- sufficient to meet
22 the --

23 THE COURT: I don't see how the standard of proof
24 have any effect here whatsoever based on your argument. What
25 standard of proof do you say should have been applied?

1 MR. CHEN: Well, it's applied in a number of states
2 and what several state Supreme Courts have held requires as a
3 matter of constitutional law is a clear and convincing
4 standard, rather than a preponderance.

5 THE COURT: There are three general standards:
6 preponderance, more probable than not, beyond a reasonable
7 doubt, very highly probable in the 90 percent probability
8 involved, and clear and convincing somewhere in between
9 roughly about 70 to 80 percent probability. Correct?

10 MR. CHEN: Yes.

11 THE COURT: But even if they applied the same set --
12 or the same test you're now proposing they would have reached
13 the same conclusion.

14 MR. CHEN: Oh, I'm not too sure that's the case.
15 There's no discussion certainly in the hearing -- in the
16 determination and order and the hearing that had they applied
17 a clear and convincing standard they would have reached the
18 same conclusion. It's difficult for us to say at this point
19 what that hearing committee would have done. And there are
20 cases where challenges similar to this have been denied where
21 the hearing committee did state that under any standard of
22 proof they would have come to the same conclusion, but that
23 wasn't the case here.

24 THE COURT: Some states require clear and
25 convincing. None of them require beyond a reasonable doubt.

1 MR. CHEN: I haven't come across any required beyond
2 reasonable doubt in these circumstances.

3 THE COURT: But most of them apply a preponderance.
4 Isn't that so?

5 MR. CHEN: Through medical pro -- disciplinary
6 proceedings in general but I think -- and there are fewer
7 cases directly on point where we're dealing with a medical
8 disciplinary proceeding that's predicated on charges of fraud.
9 I think that there'd be more agreement -- perhaps a majority,
10 probably a majority if -- a substantial majority even of
11 states that would say that whether as a matter of policy or as
12 a matter of due process that the higher standard should
13 supply.

14 THE COURT: Have you made such a survey?

15 MR. CHEN: I --

16 THE COURT: Is there a survey of the state showing
17 that that is the preponderance standard?

18 MR. CHEN: I've -- in our brief we did list the
19 cases of states that have addressed or at least alluded to or
20 discussed in some fashion professional disciplinary
21 proceedings predicated on fraud charges. And there seems to
22 be a view that those -- that given the heightened harm caused
23 by fraud charges in conjunction with the interest at stake in
24 professional licensing that the clear and convincing standard
25 is favored over a preponderance standard.

1 THE COURT: By more states?

2 MR. CHEN: Well, there's -- again, because that's
3 the specific challenge that we're bringing here hasn't been
4 directly addressed by some of these states it's difficult to
5 say exactly. A survey is difficult to do because there just
6 haven't been opinions in that regard. But, again, what I've
7 tried to -- what we've tried to establish is that certainly
8 with medical disciplinary proceedings in general some
9 states -- perhaps a minority, but it's an accepted view as a
10 matter of due process -- require clear and convincing
11 evidence. And given that a number -- a majority of states
12 require heightened standard of proof in fraud cases in general
13 whether -- again, whether as a matter of policy or due process
14 that suggests that more than a minority, perhaps a majority,
15 perhaps a clear majority would, again, as a matter of policy
16 or due process require heightened -- as heightened standard of
17 proof in professional disciplinary proceedings predicated on
18 fraud.

19 THE COURT: You haven't made a -- polled a survey to
20 show that at least you can say that there is a split in the
21 states with respect to the issue of the standard.

22 MR. CHEN: Well, but I think with respect to
23 professional discipline based on fraud, again, there's no --
24 it's hard -- there's -- I think there's a much heavier
25 consensus -- a much more apparent consensus --

1 THE COURT: But there is a split.

2 MR. CHEN: Sure. There are states that provide --

3 THE COURT: For both ways.

4 MR. CHEN: There are some states that --

5 THE COURT: Some say preponderance and some clear
6 and convincing.

7 MR. CHEN: True, but that's alls -- that's been the
8 case in -- as I believe almost all of the cases in which the
9 Supreme Court -- the U.S. Supreme Court has required a
10 heightened standard of proof across all states. There have
11 been some states and actually that's how the challenge gets to
12 that court in the first place. There have been some states
13 that use a preponderance and some that use clear and
14 convincing. And as a matter of constitutional due process
15 looking at the merits -- looking at the splitting the states
16 [ph.] as perhaps one factor, but both looking primarily to the
17 merits of the Matthews analysis or other due process analysis
18 just as a matter of constitutional due process the Supreme
19 Court has found a higher standard of proof necessary even in
20 light of a split in state practices.

21 THE COURT: Did the plaintiff testify at this
22 hearing?

23 MR. CHEN: Yes, I believe he did.

24 THE COURT: And what did he say?

25 MR. CHEN: I believe he attempted to -- he sought to

1 make the arguments that we were discussing earlier.

2 THE COURT: What did he say?

3 MR. CHEN: I mean, I have a transcript of the
4 proceedings before me now.

5 THE COURT: Do I have the transcript?

6 MS. LEONE: No, I don't believe you do. It's
7 something we could certainly --

8 THE COURT: Well, supply the transcript.

9 MS. LEONE: And the third department does actually
10 go through his testimony a little bit in there.

11 THE COURT: Provide the transcript, please, if you
12 please.

13 MR. CHEN: But -- and I think the salient point of
14 his testimony was that he performed these synaptic therapies
15 and provided the records to the billing company.

16 THE COURT: Did he prescribe the therapy that he
17 gave in the case that I've looked at on Exhibit 1?

18 MR. CHEN: Right. Well, the attached medical
19 records are the description -- are the records that he
20 provided to the billing company.

21 THE COURT: Did he testify with respect to these
22 exhibit and say what he did?

23 MR. CHEN: Yes. Apparently he did.

24 THE COURT: He did. Okay.

25 MR. CHEN: As he just told me, it wasn't testimony

1 in full about the records but it was definitely discussed
2 during the testimony and as part of the examination in cross.

3 THE COURT: Well, they obviously didn't believe him.
4 I mean, he said he did those things and you concede he didn't
5 in what is actually described.

6 MR. CHEN: Well, again, Your Honor, I don't want to
7 belabor the point but I think he did do what he described to
8 the medical company and what the testimony was was that the
9 medical company then translated that without input from him
10 into these various medical codes. And that was the testimony
11 of the actual biller, this Elena Rodriguez [Ph.] --

12 THE COURT: Okay.

13 MR. CHEN: -- the testimony of her.

14 THE COURT: I understand. So in getting back to I
15 guess some of the legal matters, you know, I think it's worth
16 noting that in the asset forfeiture context there's a case
17 that Your Honor authored in 121 Nostrum [Ph.] Avenue
18 forfeiture cases, 760 F. Supp. 1015, that -- you know, where a
19 statute or an action is really punitive in nature the law
20 would be more comfortable with the scheme that placed the
21 entire burden on the Government to establish this case, that
22 forfeiture is warranted with a standard that is higher than a
23 preponderance and that such a standard may be constitutionally
24 mandated and that's basically the argument we're making here.
25 Again, dealing with what I think is both a liberty and a

1 property interest, not just a property interest as the state
2 has argued and I think arguably would have been the case in
3 the last forfeiture case.

4 Now, with respect to the cases cited, the State has
5 offered the Theodore Freeman and Seymour Freeman cases from
6 the Second Circuit and Eastern District from the attorney
7 reciprocal discipline context, but I think it's worth noting
8 that those were both decided before the state Supreme Court
9 decisions on a due process ground that professional discipline
10 requires a heightened standard which were cited in 2001 and
11 2000 and 1996, which I believe were before the cases cited by
12 the State. And also roughly it's worth noting that the Second
13 Circuit case, the Thomas Freeman case, really doesn't contain
14 much substantive analysis of the proper standard to use in
15 these cases at all.

16 The State also brought up the securities fraud cases
17 but, again, under Matthews analysis I think the outcome is
18 very different. The SEC sanctions that were at issue there I
19 believe are largely limited to the firms regulated.

20 THE COURT: I can prevent a person from -- they can
21 prevent them from making this [unintelligible] or acting on
22 the security exchange.

23 MR. CHEN: In --

24 THE COURT: Which is quite serious.

25 MR. CHEN: True, but unlike the practice of law or

1 medicine the financial industry has a large number of
2 lucrative business opportunities outside of the specifically
3 regulated firms, so it -- I don't think it's so much
4 foreclosing the entire profession as opposed to the regulated
5 portion of the industry, which is large but not complete.

6 And I think it's also worth noting that those that
7 practice in the financial industry -- you know, I don't mean
8 to belittle them, but they -- but compared to doctors and
9 lawyers I think they have a rela -- somewhat smaller
10 investment and time experience in working in those fields.
11 There's no required schooling and accredited schools, for
12 instance.

13 Now, with respect to the Matthews analysis obviously
14 there's the three prongs that are well known: the liberty --
15 the strength of the interests held by individual, the risk of
16 error, and the governmental -- the Government's countervailing
17 interest. The main points I want to make here are with
18 respect to the liberty interests and I think that this
19 interest in professional licensure does carry a strong liberty
20 component as the various state Supreme Courts have addressed
21 the issue have found and as the Second Circuit and this RRI
22 Realty case stated as well following a Sixth Circuit decision
23 addressing the liberty interests of professional -- of
24 licensure and ability -- and the freedom to work in a
25 particular profession.

1 Now, the State states that it wants -- seeks to
2 distinguish these cases by saying that the liberty interest
3 is -- only attaches to the process of entering into a
4 profession rather than acting within the profession, but that
5 seems to me a rather -- not quite the distinction that's
6 important here that, you know, whether you're becoming --

7 THE COURT: Oh, I agree with that.

8 MR. CHEN: Entering profess -- well, and just to
9 note the Seventh Circuit case supposedly limiting focus and
10 wasn't really dealing with exit from a profession but really
11 just his entitlement to a particular job at a particular
12 university after -- as a [unintelligible] professor after his
13 contract was up.

14 Now, on the risk of error prong, you know, I think
15 the main -- one of the main points I want to make here is that
16 because we're dealing with professional licensure predicated
17 on fraud. I think the fact that the states recognize and many
18 jurisdictions recognize that charges require a standard of
19 proof greater than a preponderance reflects at least in part
20 that these charges are more error prone and I think the --

21 THE COURT: Well, isn't that true also of lawyers of
22 being disbarred for fraud?

23 MR. CHEN: Yeah. And it's true that those may
24 require -- that the logic would apply to attorney discipline
25 as well in five cases.

1 THE COURT: Okay. But apply the preponderance
2 standard. What's the rules throughout the country in New York
3 and in federal court?

4 MR. CHEN: For attorney discipline?

5 THE COURT: Any discipline.

6 MR. CHEN: In New York I believe it is preponderance
7 but in other jurisdictions it -- other jurisdictions do assign
8 it -- do require a clear and convincing standard for attorney
9 discipline as well.

10 THE COURT: So, again, it's a split?

11 MR. CHEN: Sure. As in almost all the due process
12 cases that come across it the Supreme Court -- the U.S.
13 Supreme Court decided that, yes, there has been a split but,
14 again, working from the first -- and that split is certainly a
15 factor that can be considered. But, again, I think the
16 primary inquiry here is under Matthews analysis what is
17 required as a standard of proof, both Matthews and also
18 looking to the allocation of risk of error there's like --
19 there are cases that address that address that as a rationale
20 for choosing a particular standard of proof.

21 THE COURT: Well, there's a risk of error. There's
22 also a risk for the population as a whole having fraud.

23 MR. CHEN: Sure. And --

24 THE COURT: In connection with the billing and other
25 practices, particularly given a rich course of medical

1 facilities.

2 MR. CHEN: Sure. And that's certainly a factor but,
3 for example, you know, I think Judge Corson in the Seventh
4 Circuit opinion undertook this anal -- explained -- elucidated
5 this analysis that, you know, for example, a preponderance
6 standard is appropriate where, you know, if you would decide
7 incorrectly one way or the other basically interests are the
8 same. The risk of error is borne equally. In the criminal
9 context there's a great -- there's a much larger imbalance,
10 pretty extreme imbalance where if one -- if an innocent man is
11 wrongfully convicted, he obviously bears the loss of liberty
12 for an extended period of time and the State bears the
13 statement costs of incarcerating or incapacitating that person
14 wrongfully. But in the other direction where an innocent man
15 goes free the State bears some loss of incapacitation and
16 deterrence but arguably relatively minor costs in that regard
17 given that one can incapacitate them in other ways.

18 THE COURT: Well, I understand on the projections.
19 They go back to the Biblical rules and they're based strictly
20 on rules. I mean, you could justify a policy in criminal law
21 more probable than not given the risks to the population and to
22 the defendant. I don't -- I wouldn't support it but applying
23 a positive economic approach.

24 MR. CHEN: Right. Well, I offer it just as a --

25 THE COURT: [Unintelligible] --

1 MR. CHEN: -- an alternative way of thinking about
2 the problem.

3 THE COURT: Well, I don't think it's at all helpful.

4 MR. CHEN: All right. Well, I'll move on, then.

5 THE COURT: With all due respect. I mean, it's
6 interesting, but not helpful.

7 MR. CHEN: I'll move on, then. But, again, with
8 respect to the fraud charges I think there is precedent for
9 the notion that they are more error prone and deserving of a
10 higher standard of proof. They're almost always based on
11 circumstantial rather than direct evidence. There's the case
12 People v. Ford from New York Court of Appeals explaining that
13 where there are cases that are purely circumstantial evidence
14 there's complex and problematical reasoning processes, that
15 there's a dangerous -- danger associated with circumstantial
16 evidence that a fact finder might leave logical gaps in the
17 proof offered and draw unwarranted conclusions based on
18 probabilities of low degree. So that --

19 THE COURT: Presumably the New York State
20 Legislature considered that balance and decided that
21 protection of the public required a preponderance.

22 MR. CHEN: They may have considered that, but --

23 THE COURT: Shouldn't the courts if they're
24 nonactivists generally follow the legislative policy made
25 presumably after deep thought in the opening?

1 MR. CHEN: Well, I think it's worth noting that in
2 this case the statute is applied -- the standard of proof they
3 apply addresses position of disciplinary hearings in general.
4 There's no specific provision for fraud charges so to the
5 extent that -- so that's why I think the challenge that we're
6 bringing here is relatively narrow and actually may be a
7 circumstance that was not contemplated specifically by the
8 legislature.

9 Another point that the State brought up was that
10 these combined investigative prosecutorial and adjudicatory
11 functions which was the case in this case have been found to
12 satisfy due process. And -- but I think that's not really
13 argument here. It's not that those take -- that feature of
14 the proceedings itself violate the Constitution but having
15 those -- having the functions of investigation prosecution and
16 adjudication all within one body does increase the error to a
17 degree or --

18 THE COURT: It's not constitutional.

19 MR. CHEN: It's not constitutional standing on
20 its --

21 THE COURT: Administrative law. It's basic --

22 MR. CHEN: Sure. It's not -- even if it's not
23 unconstitutional on its own, though, that in combination with
24 the other Matthews factors, the fact that it may increase the
25 error and that there are these important individual interests

1 at risk would lead to the conclusion that overall -- that
2 taken the factors as a whole a higher standard of proof is
3 prescribed.

4 Now, the third prong on governmental interests and I
5 think the point we want to make here is that this -- this --
6 the notion that the efficient processing of complaints is
7 implicated by a higher standard of proof, you know, I'm not
8 sure that that's as huge a factor as the State makes it out to
9 be given that a number of states already apply a higher
10 standard of proof. It should be clear that it's not clearly
11 still high a cost as to make it significantly difficult to
12 discipline positions where necessary and it's also unlikely
13 that the Government is bringing its cases with weaker evidence
14 than it might already be bringing based on -- only on the
15 standard of proof that they're faced with.

16 And there was a discussion earlier about the *res*
17 *judicata* effect of the Article 78 proceedings. I do have a
18 citation from the Second Circuit, University Club v. City of
19 New York. I believe the quote from that was that
20 constitutional challenges to legislative enactments may not be
21 raised in Article 78 proceeding to review an administrative
22 action. And my understanding was that the -- was that the
23 facial challenge of the sort that we're bringing here was not
24 available in their 78 proceeding which is why it wasn't -- one
25 reason why it wasn't raised at least and that's a reason why

1 we're bringing it here.

2 The argument with the reopen procedures I think one
3 thing we wanted to clarify there is that plaintiff isn't
4 seeking a mentoring mechanism for reopening all hearings
5 whenever there's a change in the law, but rather the ability
6 to have -- for an ALJ for the plaintiff to go back to the ALJ,
7 not the director of OPMC but the ALJ that was handling the
8 original hearing or and ALJ in its place to at least consider
9 request for exculpatory evidence and to reopen the hearing and
10 decide the merits --

11 THE COURT: Well --

12 MR. CHEN: -- in that case.

13 THE COURT: -- that evidence was available to him
14 and to his attorney at the time. This is not something that
15 was hidden like a secret report. This was generally known in
16 the field according to him and his reliance on his billing
17 enterprise. So all of this was available and he could have
18 put this in as a defense. Did he?

19 MR. CHEN: This --

20 THE COURT: There's nothing hidden.

21 MR. CHEN: It was around. But, again, because he
22 wasn't involved with the clinic at the time -- by the time of
23 the hearing, he didn't have access to these records and, as I
24 understand, the evidence that --

25 THE COURT: He didn't have access to his records?

1 MR. CHEN: Well, not direct access. He wasn't
2 involved with the clinic, no.

3 THE COURT: He could have introduced any records he
4 wanted at the administrative hearing. You're not contending
5 otherwise, are you?

6 MR. CHEN: No, but what was introduced at the
7 hearing was a partial set of records.

8 THE COURT: He was represented by an attorney at a
9 hearing. He could have put in anything he wanted including
10 other experts, including testimony of his own, which he used.
11 Did he have any other witness?

12 MR. CHEN: Yes, he had the biller.

13 THE COURT: He had the biller and he could have put
14 in anything he wanted.

15 MR. CHEN: Well --

16 THE COURT: But I just don't understand this
17 collateral -- what amounts to a collateral attack after the
18 event on the administrative hearing when all of the evidence
19 that he now proposes to put in was available to him at the
20 time of the hearing.

21 MR. CHEN: Well, I think the specific documentary
22 evidence that he's looking for which are these bills and
23 arbitration decisions and documents he didn't know about those
24 specific documents at the time of the hearing.

25 THE COURT: What hearing?

1 MR. CHEN: Well, they're attached in one of the
2 exhibits that I think the State provided but there's a number
3 of peer reviews from arbitration proceedings and sample bills
4 from other providers that showed a misunderstanding. And
5 these specific documents --

6 THE COURT: Were they used in this proceeding?

7 MR. CHEN: No, they weren't because he did not --

8 THE COURT: Were they used by the board in these
9 proceed -- this proceeding?

10 MR. CHEN: They -- no, the documents that he's
11 looking -- seeking were not used by the Court.

12 THE COURT: So they were available to him. I
13 don't --

14 MR. CHEN: Right. No, but --

15 THE COURT: Clearly don't understand the point.

16 MR. CHEN: No, but the point is that they -- they
17 existed but he didn't know about their existence and he didn't
18 have them available to him.

19 THE COURT: But he was relying essentially on the
20 fact that everybody was doing this. So this must have been
21 available to him. This is not like Brady material.

22 MR. CHEN: Well, but I think that it's somewhat akin
23 to that in that that was his argument but without -- without
24 having exculp -- such evidence directly available to him even
25 though it may have been available to the State --

1 THE COURT: But there wasn't. The --

2 MR. CHEN: -- from their investigation --

3 THE COURT: -- State didn't introduce it. There's
4 no contention that the board used it.

5 MR. CHEN: Well, the State didn't introduce it
6 because it would have gone against their case, I assume, if
7 they had.

8 THE COURT: The State didn't use it. There's no way
9 information that the board used it and had his attorney
10 prosecuted defense -- the defense it could -- he could have or
11 she, the defense. It could have introduced it.

12 MR. CHEN: But no. I don't think that's right
13 because the doc -- he didn't -- he only learned about the
14 existence of these particular documents well after the case
15 once other providers had learned of his predicament.

16 THE COURT: Well, I don't find that very persuasive,
17 but I understand your point.

18 MR. CHEN: Well, I'm sorry you don't but -- and I
19 don't want to belabor the point.

20 THE COURT: And we have most of the litigation as to
21 him.

22 MR. CHEN: Sure. But I think it's worth remembering
23 that the plaintiff did seek this evidence from the State
24 through a motion during the hearing --

25 THE COURT: What motion did he make?

1 MR. CHEN: He made a motion requesting that the
2 State provide -- turn over exculpatory evidence in its
3 possession and this motion was --

4 THE COURT: Let me see the motion, please.

5 MR. CHEN: I'm not sure if that particular motion
6 was included in the doc -- in the exhibits in this case.

7 THE COURT: Well, let me see the motion. Let me see
8 the motion, see what he asked for.

9 MR. CHEN: I don't believe it's included in the
10 record that I have here, but we can submit it.

11 THE COURT: Do you have it? It's part of the
12 record. Make it available. I didn't gather from the material
13 before me that he had made a motion.

14 MR. CHEN: I believe we signed it in the briefs but
15 if it wasn't made clear I apologize but, yes, during the
16 hearing he did make a motion to the State requesting
17 exculpatory evidence. This motion was to deny --

18 THE COURT: Generally or specifically with respect
19 to this evidence?

20 MR. CHEN: I understand those --

21 THE COURT: How [unintelligible] --

22 MR. CHEN: I understand it's specifically to this
23 evidence, but we'll have --

24 THE COURT: You'll have to. We're just --

25 MR. CHEN: We'll see.

1 THE COURT: -- working without knowledge. You'll
2 have to get it to me.

3 MR. CHEN: Well, regardless. He did make a motion
4 during the hearing seeking exculpatory evidence and that was
5 denied on the basis of case law that said that there was no
6 requirements to turn over exculpatory evidence.

7 Following the hearing there -- as we've discussed
8 there was a change in the governing law stating that
9 exculpatory evidence does have to be provided in these cases
10 so had that been in effect before he had made that original
11 motion obviously the grounds for that -- the denial of that
12 motion would no longer have been valid.

13 THE COURT: Now, as I understand it he has not made
14 a motion to reopen the record now.

15 MR. CHEN: He made a motion to the ALJ in that case
16 to seek exculpatory evidence and to reopen it if exculpatory
17 evidence was sufficient to justify it.

18 THE COURT: No, post -- post hearing.

19 MR. CHEN: Post judgment, yes.

20 THE COURT: You made a motion?

21 MR. CHEN: He -- based on the new law, yes, but the
22 ALJ denied that motion saying that there was no mechanism for
23 him, the ALJ, to reopen the hearing or to consider or to
24 gather new evidence or to order the turn over of new evidence.

25 THE COURT: Could he have gone to the board or

1 somebody else?

2 MR. CHEN: There's a provision for -- and I think
3 what the State was discussing, this proficient 23010Q which
4 permits someone to petition the director of OPMC, which is
5 different. And the director doesn't have the power to reopen
6 a hearing but can at his discretion in consultation with
7 another attorney at the department -- in his discretion he can
8 decide whether to modify or vacate the order.

9 THE COURT: Did he himself on the basis of --

10 THE COURT: He can --

11 THE COURT: -- new evidence?

12 MR. CHEN: -- decide whether to petition the board
13 to --

14 THE COURT: I see. So the board --

15 MR. CHEN: -- make it --

16 THE COURT: -- would have to do it?

17 MR. CHEN: Sure. But it's within the discretion.

18 THE COURT: Well, why hasn't he used that available
19 procedure?

20 MR. CHEN: Because he's looking for the exculpatory
21 evidence in the first place. He's not -- and I think to do
22 that he needs the ALJ to at least hear the motion and consider
23 the merits of that claim.

24 THE COURT: Why hasn't he applied for the remedy
25 which is available to him?

1 MR. CHEN: Because that doesn't provide all the
2 relief that he's seeking.

3 THE COURT: But if he received a favorable response
4 that would put him on the road to getting the relief and
5 getting the information, would it not?

6 MR. CHEN: It may, but it's difficult to -- it would
7 be difficult to get a favorable response without having any
8 exculpatory evidence that's in his possession in the first
9 place.

10 THE COURT: If you have some. You've --

11 MR. CHEN: Well, there are samples but I believe
12 what plaintiff has asked for is additional documents --

13 THE COURT: I understand, but you have enough to
14 show that there is an issue here, correct?

15 MR. CHEN: Yes.

16 THE COURT: Otherwise you wouldn't be in federal
17 court.

18 MR. CHEN: Sure. I think so. And --

19 THE COURT: Why -- I don't understand why he has --
20 why can't the federal court before exhausting his remedy in
21 state court -- in the state administrative hearing.

22 MR. CHEN: I think he believes that there -- that
23 plaintiff believes that there is much more evidence besides
24 this that's available.

25 THE COURT: Once he used what he had to show that

1 they're probably, as you put it, is more he at least has an
2 opportunity to convince the administrative powers to reopen
3 his hearing.

4 MR. CHEN: But the 23010Q provision I don't believe
5 gives the director the power --

6 THE COURT: May I see it, please?

7 MR. CHEN: The statute -- yes.

8 THE COURT: Really.

9 MR. CHEN: Yes. I apol -- they're over a portion
10 near the bottom. There's no --

11 THE COURT: Wait, wait. Let me read it for the
12 record. Public Health Law 230(10)(q) "At any time subsequent
13 to the final conclusion of a professional misconduct
14 proceeding against the licensee" and then there's material
15 left that clearly is not applicable. "The licensee may file a
16 petition with the director requesting vacatur" -- v-a-c-a-t-u-
17 r -- "or modification of the determination and order. The
18 director shall after reviewing the matter and after consulting
19 with department counsel, determine in the reasonable exercise
20 of his or her discretion whether there was new and material
21 evidence that was not previously available which had it been
22 available would have likely -- would likely have led to a
23 different result or the circumstances have occurred subsequent
24 to the original determination that warrant a reconsideration
25 of the measure of discipline. Upon determining that such

1 evidence or circumstances exist the director shall have the
2 authority to join the licensee in an application to the
3 chairperson of the state board for professional medical
4 conduct to vacate or modify the determination and order as the
5 director may deem appropriate. Upon the joint application of
6 the licensee and the director the chairperson shall have the
7 authority to grant or deny such application."

8 We've clearly come within this provision for two
9 reasons. First, you have new evidence, correct?

10 MR. CHEN: We have some new evidence but we think
11 there's more.

12 THE COURT: And you have some new evidence which not
13 only is important in itself but suggests that there's more
14 evidence, correct?

15 MR. CHEN: But there's no power that the director
16 has under this statute to provide that evidence or
17 requirements.

18 THE COURT: And you also have a change of
19 circumstances in that the law was modified subsequent to the
20 hearing to provide that they must rely upon exculpatory
21 evidence. Correct?

22 MR. CHEN: Yes.

23 THE COURT: So that PHL 230.10(q) is available.

24 MR. CHEN: It's available and --

25 THE COURT: I am not going to in this federal court

1 determine that a state statute of this importance is
2 unconstitutional when you have not exhausted the remedies
3 available under the statute used to deny him his license and
4 get the license back.

5 MR. CHEN: But even -- I think it's worth
6 considering that even had my client availed himself of this
7 procedure this procedure would still have been available to
8 him and --

9 THE COURT: Well, admit -- I just read it to you.
10 Isn't that available now? You just conceded a few moments ago
11 that it was, I thought.

12 MR. CHEN: It's available to him but, again, it
13 doesn't provide the relief that he requested, that he's
14 seeking in this case.

15 THE COURT: If he uses this procedure and he's
16 successful it's possible -- I don't say it's likely, but
17 there's a good basis for saying that he will get a re-hearing
18 and that the re-hearing will be -- will result in his getting
19 his license back.

20 MR. CHEN: Well, no, I don't believe that there's a
21 provision for re-hearing. Am I wrong? For a re-hearing
22 specifically. He can -- the director can petition to vacate
23 or modify the order.

24 THE COURT: That's right.

25 MR. CHEN: But there's no provision for --

1 THE COURT: The order would be the order finding
2 fraud and penalizing him.

3 MR. CHEN: But that would just be the end result and
4 left to the director's sole discretion but what my client is
5 seeking --

6 THE COURT: He has not -- you -- I'm not going to
7 say that the director wouldn't exercise his discretion
8 appropriately.

9 MR. CHEN: Well, it's -- I think it's difficult to
10 say that this is -- this qualifies as an unexhausted remedy.
11 Again, where it's a standardless discretion and -- or to a
12 large extent standardless and --

13 THE COURT: Well, it's not standardless because the
14 discretion has to be exercised reasonably. I mean, it can't
15 be arbitrary. That's clear, right? It may be discretionary,
16 but it's not arbitrary.

17 MR. CHEN: Of course.

18 THE COURT: It's a very interesting case and I find
19 the arguments interesting but I don't think I'm prepared to
20 exercise any jurisdiction.

21 MR. CHEN: Well, if it's based -- if --

22 THE COURT: The question in my mind is whether to
23 stay the case in the federal court while you proceed with your
24 administrative remedies or to dismiss it but not on the
25 merits. There's no statute of limitations here so he can

1 always come back. He certainly has an Article 78 proceeding
2 if he exercised discretion arbitrarily, a new Article 78
3 proceeding.

4 Well, I think you ought to brief it. I want the --
5 is that your position now that it should be dismissed because
6 he hasn't exhausted?

7 MS. LEONE: Well, I think for a number of reasons
8 that all of --

9 THE COURT: Yes or no?

10 MS. LEONE: Yes, that's for the third claim.

11 THE COURT: All right. Rebrief it. With all the
12 things we've talked about including that give considerable
13 attention to that because it seems to me decisive.

14 MR. CHEN: Sir --

15 THE COURT: How long do you want to rebrief it?

16 MS. LEONE: [Inaudible]

17 THE COURT: Two weeks. How long do you want to
18 respond?

19 MR. CHEN: One week.

20 THE COURT: And then you'll submit it with a
21 proposed judgment by the state if the law supports that the
22 case is dismissed for failure to exhaust the remedy, the
23 administrative and other remedies available to the plaintiff
24 to challenge the result that he's now challenging.

25 Anything else anybody wishes to say at this point?

1 MR. CHEN: At that point, it'll be in our briefs.

2 MS. LEONE: Thank you.

3 THE COURT: All right. Thank you very much. Very
4 interesting case. I must say, I'm not unsympathetic to the
5 plaintiff. I do believe these are serious events taking away
6 a license to practice medicine which will probably result in
7 the loss of his license to practice eventually. Very
8 important but it's also important to protect the public and
9 the honesty of these applications for payment because the
10 amount of fraud in the medical field is enormous. It probably
11 runs into the hundreds of billions of dollars [unintelligible]
12 care and other kinds of fraud in billing and other practices,
13 so I consider it an important and difficult case.

14 I do think the State ought to -- if there is a
15 mistake the State will have an opportunity to correct it where
16 it is provided, the procedures to do so particularly now
17 because you have a change of circumstances the law has been
18 specifically changed, right, to cover exactly what you're
19 complaining about. Well, thank you very much for the very
20 interesting argument. Very well written.

21 (Proceedings concluded at 11:41 a.m.)

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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6 _____
7 Ruth Ann Hager

8 Dated: September 15, 2010
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